75-1118

IN THE SUPREME COURT
OF THE UNITED STATES

DON BENSCHOTER — Appellant

-vs-

FIRST NATIONAL BANK OF LAWRENCE, A Corporation, and KUHN TRUCK & TRACTOR COMPANY, INC., A Corporation — Appellees

Appeal from:
THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Don Benschoter, the appellant, files this statement of the bases on which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and that the Court should exercise such jurisdiction in this case.

Opinion Below

The Supreme Court of Kansas, in its opinion in Benschoter v. First National Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), held that the provisions of K.S.A. 84-9-503, authorizing the use of self-help repossession by a secured creditor, did not violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The judgment affirmed the initial ruling of the Douglas County District Court against the appellant.

Jurisdiction

The appeal herein is from a final judgment made and entered in the Supreme Court of Kansas. The judgment upholds the constitutionality of a state statute, to wit: K.S.A. 84-9-503. The Supreme Court has jurisdiction to review this final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

The final judgment was rendered and filed November 8, 1975. Notice of Appeal was filed on February 5, 1976 in the Supreme Court of Kansas (a copy of which notice is set out in Appendix "D" hereto).

Statute Involved

84-9-503. Secured party's right to take possession after default. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 84-9-504.

Questions Presented

1. Whether the self-help provisions of K.S.A. 84-9-503 render the statute

constitutionally defective so that the taking of appellant's property thereunder by these appellees violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

2. Whether the authorization of self-help repossession under K.S.A. 84-9-503, as to obviate the necessity of any judicial involvement by appellees in which due process could be protected, constituted sufficient state action so as to invoke the protections of the Fourteenth Amendment?

3. Whether, under the facts of this case, the conduct of appellees in pursuing self-help repossession, as authorized by the statutes of Kansas and as sanctioned by the Supreme Court of Kansas, constituted the taking of appellant's property without due process of law?

Statement of the Case

Don Benschoter, the appellant, negotiated a loan with the First National Bank of Lawrence, Kansas, one of the appellees. The appellant signed a promissory note and security agreement secured by various items of farm equipment. The security agreement gave the Bank "the remedies of a secured party under the Kansas Uniform Commercial Code" and further provided that "upon default Secured Party (Bank) shall have the right to the immediate possession of the Collateral." The seller of the farm equipment which was pledged as security, Kuhn Truck and Tractor

Company, Inc., the other appellee, endorsed the bank note as guarantor.

After appellant was able to pay only $500.00 of a $900.00 payment due and unable to pay the next $300.00 payment, Luis Kuhn, an officer of the Kuhn Company, went to the appellant's home while appellant and his wife were away from home, and prevailed upon the appellant's seventeen-year-old son to open a padlocked gate which protected the equipment. He then removed the secured property.

Appellant, in an effort to regain possession of this equipment, brought a civil action alleging trespass and conversion. The due process questions appealed herein were first presented in appellant's initial petition. They were argued before the District Court of Douglas County, Kansas in response to appellees' Motion for Summary Judgment. That court rejected appellees' due process argument in a Memorandum of Decision on January 24, 1974 (a copy of which is attached hereto as Appendix "B").

While that decision denied summary judgment on the basis that there was some question as to whether the statutory self-help provisions had been complied with, the same court, on a reconsideration of appellees' motion, subsequently granted summary judgment. That decision (a copy of which is attached hereto as Appendix "C") again summarily dismissed appellant's challenge of the statute as being an unconstitutional denial of due process in authorizing the taking of appellant's property.

Constitutional Questions Are Substantial

The constitutional questions raised herein are substantial and concern the matter of the taking of secured personal property by a creditor employing self help and without judicial involvement pursuant to a state law that allows such self help. The state Court has held such law to be good and has found the self help provision thereof constitutionally permissible, finding no state involvement in the self help taking process.

Four recent cases decided by this Court logically reach the threshold of the questions raised here, and the issue of self help in repossession provisions of state statutes should be resolved. The four cases referred to are: Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 93 S. Ct. 177, 32 L.Ed.2d 556 (1972); Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751(1975).

Many states are involved, many thousands of debtors and creditors alike await definitive guidelines, and appellant asks this Court to now say that there may be no repossession without judicial involvement and the right to a hearing if desired. Such a holding would remove

once and for all this great invitation to disorder in our society. There is no longer any justification for creditors, by stealth or otherwise, to employ self help in the repossession of personal property. And a state should not be permitted to encourage such conduct by statutorily allowing self help and then denying that the state is involved.

Conclusion

The Court should take jurisdiction of this appeal.

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APPENDIX "A"

No. 47,761

DON BENSCHOTER, *Appellant*, v. FIRST NATIONAL BANK OF LAWRENCE, A Corporation, and KUHN TRUCK & TRACTOR COMPANY, INC., A Corporation, *Appellees*.

SYLLABUS BY THE COURT

1. SECURED TRANSACTIONS—*Self-help Repossession Does Not Violate Due Process—State Action Not Present.* The self-help repossession provisions of K. S. A. 84-9-503 do not violate constitutional due process because no state action is present when the state passes a law which: (*a*) does not change the common law or previously codified statutory law; (*b*) does not significantly encourage and involve the state in private action; and (*c*) does not involve any state official in the prejudgment self-help repossession of collateral.

2. SAME—*Creditor May Repossess Collateral without Judicial Process—Breach of Peace—"Stealth" Does Not Constitute Breach of Peace.* A creditor may repossess collateral without judicial process if this can be done without breach of the peace. Standing alone, stealth, in the sense of a debtor's lack of knowledge of the creditor's repossession, does not constitute a breach of the peace.

3. SUBROGATION—*Right to Subrogation—Part Payment.* The general rule that one may not be subrogated to the rights and securities of a creditor until the claim of the creditor has been paid in full is subject to limitation. The rule against subrogation on part payment is that a creditor cannot equitably be compelled to split his securities, and give up control of any part until he is fully paid. Such rule is for the benefit of creditors, and the creditor alone can object to subrogation under partial payment, and only to the extent that it would impair his preferred rights. But the rule extends only so far as its reason goes and is never invoked to defeat obligations in the interest of the debtor alone.

4. SECURED TRANSACTIONS—*Self-help Repossession Not Unconstitutional—"Stealth" Not Breach of the Peace—Guarantor Entitled to Subrogation Rights—Summary Judgment.* In a civil action for damages arising from a creditor's self-help repossession, the trial court granted summary judgment in favor of the creditor and its guarantor. On appeal the record is examined, and for the reasons stated in the opinion it is *held:* (*a*) The self-help provisions of K. S. A. 84-9-503 are not constitutionally infirm; (*b*) the "stealth" asserted by the debtor in this case did not constitute a breach of the peace; (*c*) the guarantor of an obligation was entitled to be subrogated to the rights of the creditor against the principal; and (*d*) the trial court did not err in granting judgment as a matter of law in favor of the creditor and its guarantor.

Appeal from Douglas district court, division No. 2; JAMES W. PADDOCK, judge. Opinion filed November 8, 1975. Affirmed.

Jane B. Werholtz, of Harley & Werholtz, of Topeka, argued the cause and was on the brief for the appellant.

Richard L. Zinn, of Barber, Emerson, Six, Springer & Zinn, of Lawrence, argued the cause, and *Thomas V. Murray*, of the same firm, was with him on the brief for the appellee, The First National Bank of Lawrence.

Gerald L. Cooley, of Allen & Cooley, of Lawrence, argued the cause, and was on the brief for the appellee, Kuhn Truck and Tractor Company, Inc.

The opinion of the court was delivered by

SCHROEDER, J.: This is an appeal from an order of the trial court granting a creditor judgment thereby affirming the creditor's "self-help" repossession of the plaintiff's property (pledged as security for a loan) pursuant to K. S. A. 84-9-503. The provision of that statute in the Uniform Commercial Code pertinent to this appeal reads:

"Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

The facts leading to the challenged "self-help" repossession are not complicated. Don Benschoter (plaintiff-appellant) is a farmer and security guard in Lawrence, Kansas. On June 15, 1971, he negotiated a loan from Mr. Warren Rhodes, president of the First National Bank of Lawrence (hereafter referred to as the Bank). The appellant signed a $4,096.73 promissory note and security agreement secured by various items of farm equipment: a combine, a grain drill, a hay conditioner and a cadet mower. This security agreement gave the Bank "the remedies of a secured party under the Kansas Uniform Commercial Code" and specifically provided that "upon default Secured Party [Bank] shall have the right to the immediate possession of the Collateral." The seller of the farm equipment which was pledged as security, Kuhn Truck and Tractor Company, Inc., (hereafter referred to as the Kuhn Company) endorsed the bank note evidencing the loan as guarantor.

The appellant met his payment obligations, although frequently late, until July 1, 1972. On July 1, 1972, a $900 payment was due. The appellant paid only $400. That $400 payment was made to Kuhn Company who paid the $400 plus the remaining $500 still due to the Bank.

On September 1, 1972, a $300 payment was due but never made. Shortly prior to this time Louis Kuhn, an officer of the Kuhn Company, had started out to the appellant's home to obtain the $500

owed on the July 1, 1972, payment. On the way he met the appellant and discussed the $500 owed and the approaching $300 payment. The appellant indicated he couldn't meet Mr. Kuhn's demands that day but he might have the money on Saturday, September 2, 1972. At that time the appellant said, "if I can't get the money, I'll bring it [the farm equipment] back." The bank had previously informed the appellant that unless payments were made, Mr. Kuhn would be asked to pick up the equipment. Mr. Kuhn testified he repeated that warning saying:

". . . Don, what are we going to work out on this equipment that you owe us for? . . ."

The appellant replied:

". . . I'm just to the point where I don't think I can do anything. Things have gone against me, and I'm just going to have to let you have it all back. There is no way I can pay for it, there is no way I can pay for it. I'm just going to let you have it back. . . I'll bring the equipment in to you. I can't bring it in tomorrow. I can't bring it in tomorrow, but I'll bring it in Saturday. . . ."

Mr. Kuhn said:

". . . Don, if you don't bring the equipment in, we are going to have to come and get it. . . ."

The appellant replied:

". . . *That's all right. If I don't bring it in to you, you come on out and get it.* . . ." (Emphasis added.)

On Tuesday, September 5, 1972, not having received any money from the appellant, Louis Kuhn and an employee went to the appellant's home. Both the appellant and his wife were away from the home but their three children, ages seventeen, fifteen and thirteen were home. Mr. Kuhn went to the door of the appellant's house and asked the children to let him pick up the secured farm equipment. The hay conditioner was in the driveway in front of the barn. The cadet mower was in the barn. The appellant's seventeen-year-old son opened a padlocked gate protecting the equipment and helped them get the mower from the barn. The son also gave Mr. Kuhn a carburetor which was not part of the secured property.

The appellant admits Mr. Kuhn never struck or threatened his children. But he contends the taking was without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The trial court sustained the appellees' motion for summary judg-

ment holding: (1) The self-help provisions of K. S. A. 84-9-503 did not violate constitutional due process; (2) that no legal question existed as to whether the appellee Kuhn Company had breached the peace by the use of "stealth"; and (3) that the appellee Kuhn Company as a guarantor of the appellant's obligation to the bank was subrogated to the rights of the bank and became a secured party and thus had a right to repossess the property.

The points assigned by the appellant for review challenge each of the rulings made by the trial court.

The appellant first argues the due process requirements of the Fourteenth Amendment of the United States Constitution requires that he should have been given notice and a prior hearing. The due process clause of the Fourteenth Amendment of the United States Constitution reads:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Under this clause, state action is neceessary to invoke the Fourteenth Amendment. Acts of private individuals, however discriminatory or wrongful, are outside the scope of the Fourteenth Amendment. (*Shelley v. Kraemer,* 334 U. S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836.)

The state action test is generally met when conduct formerly private becomes so entwined with governmental policies and so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action. (*Evans v. Newton,* 382 U. S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486.) The courts have never attempted the impossible task of formulating an infallible test for determining whether the state in any of its manifestations has become significantly involved in private conduct. (*Reitman v. Mulkey,* 387 U. S. 369, 378, 18 L. Ed. 2d 830, 87 S. Ct. 1627.) Only by sifting facts and weighing circumstances on a case-by-case basis can a non-obvious involvement of the state in private conduct be attributed its true significance. (*Burton v. Wilmington Parking Authority,* 365 U. S. 715, 722, 6 L. Ed. 2d 45, 81 S. Ct. 856; and *Reitman v. Mulkey,* supra, at 378.)

The appellant's primary argument is that the state has passed a law which authorizes or encourages "self-help repossession" so state action must be present. But the Federal Circuit Courts have unanimously rejected this argument. (*Shirley v. State National Bank of Connecticut,* 493 F. 2d 739 [2nd Cir. 1974], cert. denied, 419 U. S. 1009, 42 L. Ed. 2d 284, 95 S. Ct. 329; *Gibbs v. Titelman,* 502 F. 2d 1107 [3rd Cir. 1974], cert. denied, 419 U. S. 1039, 42 L. Ed. 2d 316, 95 S. Ct. 526; *James v. Pinnix,* 495 F. 2d 206 [5th Cir. 1974]; *Turner v. Impala Motors,* 503 F. 2d 607 [6th Cir. 1974]; *Bichel Optical Lab., Inc. v. Marquette Nat. Bk. of Mpls.,* 487 F. 2d 906 [8th Cir. 1973]; *Nowlin v. Professional Auto Sales, Inc.,* 496 F. 2d 16 [8th Cir. 1974], cert. denied, 419 U. S. 1006, 42 L. Ed. 2d 283, 95 S. Ct. 328; and *Adams v. Southern California First National Bank,* 492 F. 2d 324 [9th Cir. 1974], cert. denied, 419 U. S. 1006, 42 L. Ed. 2d 282, 95 S. Ct. 325.) The state courts have also unanimously rejected this contention. (*Kipp v. Cozens,* 40 Cal. App. 3d 709, 115 Cal. Rptr. 423 [1974]; *John Deere Company of Kansas City v. Catalano,* ____ Colo. ____, 525 P. 2d 1153 [1974]; *A & S Excavating, Inc. v. International Harvester Credit Corp.,* 31 Conn. Supp. 152, 325 A. 2d 535 [1974]; *Giglio v. Bank of Delaware,* 307 A. 2d 816 [Del. Ch. Ct. 1973]; *Northside Motors of Florida, Inc. v. Brinkley,* 282 So. 2d 617 [Fla. 1973]; *Hill v. Mich National Bank,* 58 Mich. App. 430, 228 N. W. 2d 407 [1975]; *Messenger v. Sandy Motors, Inc.,* 121 N. J. Super. 1, 295 A. 2d 402 [1972]; *C. L. Brown v. U. S. Nat'l. Bank,* 265 Or. 234, 509 P. 2d 442 [1973]; and *Cook v. Lilly,* 208 S. E. 2d 784 [W. Va. 1974].) Of the many federal district court decisions, only *Watson v. Branch County Bank,* 380 F. Supp. 945 (W. D. Mich. 1974) supports the appellant's argument.

One reason for the almost unanimous acceptance of self-help repossession is that 84-9-503, *supra,* did not change the common law or the previously codified statutory law. The right to peaceful self-help repossession of property under circumstances such as are here involved, far from being a right created by 84-9-503, *supra,* has roots deep in the common law. (2 F. Pollock and F. Maitland, The History of English Law, 574 [2d Ed. 1899], and 2 Blackstone, Commentaries on the Laws of England, 857-858 [4th Ed. T. Cooley, 1899].)

Prior to the enactment of K. S. A. 84-9-503, K. S. A. 58-307 (prior source, G. S. 1868, ch. 68, § 15) provided:

"In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession."

Prior cases permitted a mortgagee to use self-help to gain possession if done without a breach of the peace. (*Motor Equipment Co. v. McLaughlin,* 156 Kan. 258, 133 P. 2d 149; and *Kaufman v. Kansas Power & Light Co.,* 144 Kan. 283, 58 P. 2d 1055.) Therefore, K. S. A.

84-9-503 injects no new element upon which a finding of state action may be based.

Had K. S. A. 84-9-503, *supra,* changed our law, a finding of state action would still not be required. (*Adams v. Southern California First National Bank,* supra, and *Gary v. Darnell,* 505 F. 2d 741 [6th Cir. 1974].) Statutes regulate many forms of private activities in some manner or another. Subjecting all behavior that conforms to some statute to complete due process guarantees would emasculate the state action concept and create chaos in our society. (*Adams v. Southern California First National Bank,* supra, at 330, 331; and *Gibbs v. Titelman,* supra, at 1112.) Recent United States Supreme Court cases have held that conforming to some state regulation is not sufficient state action to trigger application of the Fourteenth Amendment. (*Moose Lodge No. 107 v. Irvis,* 407 U. S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965 [conforming to liquor regulations]; and *Jackson v. Metropolitan Edison Co.,* 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 499 [conforming to utility tariffs].) The same is true when a creditor conforms to 84-9-503, *supra;* no state action is present.

The appellant relies on *Reitman v. Mulkey,* supra, in attempting to find state action. That case dealt with racial discrimination in the sale and rental of property. Previously, California had adopted legislation prohibiting discrimination in the sale and rental of property. Later, a constitutional amendment was enacted which provided that neither the State of California nor its agents or subdivisions could prevent a person from selling or renting his property to whomever he chose. The effect of the amendment was to overturn the prior anti-discrimination statutes. The United States Supreme Court held the amendment operated to significantly encourage and involve the state in private discrimination. As such, state action was present and the amendment held unconstitutional. The appellant argues 84-9-503, *supra,* encourages private action. Yet, *Reitman* and 84-9-503, *supra,* are distinguishable.

A primary basis for distinction is the fact *Reitman* deals with racial discrimination, a consideration not present here. The historical and fundamental purpose of the Fourteenth Amendment—to eradicate racial discrimination—is not involved in creditors' rights cases. As stated by Judge Friendly's concurrence in *Coleman v. Wagner College,* 429 F. 2d 1120 (2d Cir. 1970):

". . . [R]acial discrimination is so peculiarly offensive and was so much a prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts. . . ." (p. 1127.)

(See also, *Kirksey v. Theilig,* 351 F. Supp. 727 [D. Colo. 1972]; *Adams v. Southern California First National Bank,* supra; and *Grafton v. Brooklyn Law School,* 478 F. 2d 1137, 1142 [2nd Cir. 1973].)

Second, *Reitman* involved a change in the existing law. Here there has been no change in the law of repossession as previously indicated.

Third, *Reitman* dealt with a state constitutional amendment which "encouraged" private action. The general question of whether a state statute, authorizes, establishes, or encourages private action is explored in Burke and Reber, State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 46 S. Cal. L. Rev. 1003 (1973), and 47 S. Cal. L. Rev. 1 (1973). The authors concluded, after discussing *Reitman* and other cases, that a state statute which authorizes and thereby arguably encourages private conduct does not automatically render that conduct state action.

For example, K. S. A. 77-109 indicates the common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state. Had 84-9-503, *supra,* not existed, surely the appellant would not contend that passage of this statute giving force to the common law right of repossession meant state action was present.

Similarly, the appellant could not successfully argue this state's previous judicial decisions, such as *Motor Equipment Co. v. McLaughlin,* supra, and *Kaufman v. Kansas Power & Light Co.,* supra, which permitted self-help repossession, change the former private action to state action. The state acts in deciding a case, but its decisional law which may encourage private action does not automatically become action colorable under the Fourteenth Amendment. Such a ruling would convert the doctrine of *stare decisis* into a vehicle to open all private orders for due process review.

In summarizing and explaining their conclusion that mere authorization and resulting encouragement does not necessarily result in private action becoming state action, Burke and Reber state:

"In determining whether fourteenth amendment state action is present, the focus should always be upon the actual impact of the state law upon the choice to engage in the private conduct. Unless the state law dictates the choice to be made by the party or in some way significantly interferes with the free exercise

of that choice, the private conduct and state law are not subject to constitutional restraints under the fourteenth amendment. State laws of a permissive character which authorize private conduct, and because of such authorization perhaps also encourage such conduct, do not satisfy the fourteenth amendment's state action requirement. To adopt 'authorization' or 'encouragement' in this context as a relevant state action inquiry would subject virtually every form of private ordering pursuant to state statutory, executive and judicial law to constitutional review in the federal courts. . . ." (p. 1109.)

Under this analysis, K. S. A. 84-9-503 cannot be said to significantly encourage and involve the state in private action.

Appellant further relies on several of the more modern creditors' rights cases. *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (prejudgment garnishment of wages); and *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (prejudgment replevin statute). These decisions of the United States Supreme Court reversed state laws which allowed state agents, the state court in *Sniadach* and the sheriff in *Fuentes*, to seize property without prior notice and prior hearings.

Here no state official, be he judge, clerk of the court or police officer, is involved in the prejudgment self-help repossession of the collateral. As such no state action is present. *C. L. Brown v. U. S. Nat'l Bank*, supra. Even *Fuentes* recognized this when it noted:

"The creditor could, of course, proceed without the use of state power, through self-help, by 'distraining' the property before a judgment. . . ." (p. 79, n. 12.)

The exact nature of the due process guarantees in creditors' rights cases is not clear. (Compare *Mitchell v. W. T. Grant Co.*, 416 U. S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895, with *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719.) However, that does not concern us here because no state action is present.

Only *Watson v. Branch County Bank*, 380 F. Supp. 945 (W. D. Mich. 1974) presently supports the appellant. That case may be distinguished from the case at bar as involving automobile repossession and state "ratification" of private action by transferring title to the repossessed automobile. However, many of the Federal Circuit Court cases heretofore cited are factually analagous to *Watson*, suggesting it may have a short life. Some cases have acknowledged *Watson's* existence, but refuse to adopt its reasoning. (*King v. So. Jersey Nat. Bank*, 66 N. J. 161, 169, 330 A. 2d 1, 5 [1974].) Even subsequent Michigan state appellate court opinions

do not find *Watson* persuasive. (*Hill v. Mich National Bank*, 58 Mich. App. 430, 228 N. W. 2d 407 [1975].)

The appellant suggests that the better course of action would be for the bank and other secured parties to institute legal proceedings pursuant to K. S. A. 84-9-503, under which "the secured party" may "proceed by action." However, that is not necessary. The secured party may choose the remedy it wishes; either self-help repossession or judicial action in accordance with the due process guarantees of the Fourteenth Amendment.

Commentaries on the practical and economic aspects of self-help repossession make a strong argument that absent self-help repossession credit would be more restricted or would cost more or both. (Mentschikoff, Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis, 14 Wm. & Mary L. Rev. 767 [1973]; Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S. Cal. L. Rev. 82 [1973]; and White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis. L. Rev. 503.)

Debtors are not without remedy. If the bank or secured party repossesses before default, or breaches the peace during repossession after default, it may be liable for damages. (*Klingbiel v. Commercial Credit Corporation*, 439 F. 2d 1303 [10th Cir. 1971]; *Ford Motor Credit Co. v. Waters*, 273 So. 2d 96 [Fla. App. 1973]; and *Jerman v. Superior Court*, 245 C. A. 2d 852, 54 Cal. Rptr. 374 [1966].) (See also, K. S. A. 84-9-507 and Annot., 35 A. L. R. 3d 1016 [1971].)

A default having been established, the next question is whether the Kuhn Company has committed a breach of the peace in the process of its repossession.

The appellant contends the appellees took repossession of the secured property by "stealth" and thereby committed a "breach of the peace" under the facts in this case. The appellant asserts that the Kuhn Company used "stealth" to effect the repossession because the repossession occurred without the appellant's knowledge and, arguably, at a time when the Kuhn Company knew the appellant would not be at his place of residence. The deposition testimony of the parties submitted to the court for consideration upon the motion for summary judgment fails to bear out the appellant's contention that appellees knew the appellant would not be home. In fact, the appellant's deposition testimony tends to establish the contrary. To support the appellant's assertion that "stealth" is part of a breach of the peace the appellant argues it should be defined

to cover, without more, a repossession that is effected without the debtor's knowledge. The appellant places primary reliance on *Motor Equipment Co. v. McLaughlin*, supra, a case dealing with fraud and duress which is not present here, but a case which at one point quotes 14 C. J. S., Chattel Mortgages, § 185, which says in part:

"'. . . The mortgagee must not take possession by the use of force, threats, or violence, nor, it has been held, by the use of fraud or *stealth*. . . .'" (p. 270.) (Emphasis added.)

(See 15 Am. Jur. 2d, Chattel Mortgages, § 122 and Annot., 45 A. L. R. 3d 1233, 1246, announcing same rule.)

Here Mr. Benschoter had knowledge that the property might be taken. He had received repeated warnings from the bank and the Kuhn Company, and he *agreed to the taking of repossession upon his continued default after Saturday, September 2, 1972.* Thus the appellees had permission to be on the property, both from the appellant and his seventeen-year-old son at the time of their entry. Had the seventeen-year-old son refused to let the appellees repossess (*Morris v. Bk. & Tr. Co.*, 21 Ohio St. 2d 25, 254 N. E. 2d 683 [1970]), or had he requested the appellees to wait until his father returned, a different case might be presented. (*Luthey v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 [1927].)

Although *Motor Equipment Co. v. McLaughlin*, supra, suggests that fraud or stealth may vitiate an otherwise valid repossession, the facts are wholly inapplicable to the instant case. There the secured creditor not only obtained its chattel mortgage by duress, but it effected repossession:

". . . [O]ver the protest of appellee and by force. Appellee's attorney was pushed aside after he had protested to the removal of the property and had closed the door. The door was reopened and the property was removed by a large crew of appellant's men. . . ." (p. 269.)

The question before the court was not, therefore, whether the repossession was effected by stealth, but rather whether the secured creditor was authorized to take and remove the property from the debtor's place of business by actual force.

As a matter of law this court cannot say "stealth," as the term is used in the context of this case by the appellant, constitutes a "breach of the peace." Tracing the language used in the *Motor Equipment Co.* case to its cited authority, only *Wilson Motor Co. v. Dunn*, 129 Okla. 211, 264 Pac. 194 (1928) and other Oklahoma cases subsequent to *Wilson* seem to support the stealth concept. However, stealth, in the sense of the debtor's lack of knowledge of the

creditor's repossession, does not make an otherwise lawful repossession an unlawful repossession in Oklahoma. (*Kroeger v. Ogsden*, 429 P. 2d 781 [Okla. 1967]; *General Motors Acceptance Corp. v. Vincent*, 183 Okla. 547, 83 P. 2d 539 [1938]; and *First National Bank & Trust Co. v. Winter*, 176 Okla. 400, 55 P. 2d 1029 [1936].)

White and Summers in their Handbook of the Law under the Uniform Commercial Code (West Publishing Co., 1972, pp. 968-975), discuss the essential requirement that repossession be peaceful and what constitutes a breach of the peace, as follows:

". . . To determine if a breach of the peace has occurred, courts inquire mainly into: (1) whether there was entry by the creditor upon the debtor's premises; and (2) whether the debtor or one acting on his behalf consented to the entry and repossession." (p. 967.)

Using this basis for an analysis the trial court correctly found there was no breach of the peace in this case. (*Northside Motors of Florida, Inc. v. Brinkley*, supra; *Harris Truck & Trailer Sales v. Foote*, 58 Tenn. App. 710, 436 S. W. 2d 460 [1968]; and Annot., 99 A. L. R. 2d 358 [1965].)

The question remains whether the appellee Kuhn Company, the party that physically repossessed the equipment, was subrogated to the rights of the bank and thus able to take advantage of the protection given self-help repossession by 84-9-503, *supra*. After making the August 9, 1972, payment, Kuhn Company, as guarantor of the note and security agreement became subrogated to the rights of the bank as a secured party. The Uniform Commercial Code provides that a guarantor is also a surety. (L. 1975, ch. 514, § 2 [40] [K. S. A. 84-1-201 (40)].) The code also provides:

"A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. . . ." (L. 1975, ch. 514, § 34 [5] [K. S. A. 84-9-504 (5)].)

When a surety performs under his guaranty, he is subrogated to the rights of those to whom he responds. (*United States Fidelity & Guaranty Co. v. Maryland Cas. Co.*, 186 Kan. 637, 352 P. 2d 70; and *Mountain Iron & Supply Co. v. Jones*, 201 Kan. 401, 441 P. 2d 795.) In the *Mountain Iron & Supply Co.* case the rule on subrogation was stated as follows:

"Kansas follows the rule that when a guarantor of an obligation is called upon by the creditor to pay the indebtedness, the guarantor or surety is entitled to be subrogated to the rights of the creditor against the principal. . . ." (p. 408.)

The appellant contends the Kuhn Company was not subrogated to the bank's rights under the note and security agreement at the time the appellant's property was repossessed because the Kuhn Company had not paid the full amount of the note to the bank until September 29, 1972. Kansas law is contrary to the appellant's position. In *United States Fidelity & Guaranty Co. v. Maryland Cas. Co.*, supra, the rule is stated:

"The general rule that one may not be subrogated to the rights and securities of a creditor until the claim of that creditor has been paid in full is subject to limitation. The rule against subrogation on part payment is that a creditor cannot equitably be compelled to split his securities, and give up control of any part until he is fully paid. Such rule is for the benefit of creditors, and the creditor alone can object to subrogation under partial payment, and only to the extent that it would impair his preferred rights. But the rule extends only so far as its reason goes and is never invoked to defeat contract obligations in the interest of the debtor alone." (Syl. ¶ 3.)

Here the record discloses no objection was made by the bank concerning the Kuhn Company's right of subrogation upon partial payment. Rather the record indicates that Louis Kuhn was instructed or requested, or would be instructed or requested, to repossess the security because of the appellant's continued default under the note. Therefore, we are compelled to uphold the finding of the trial court that the appellee Kuhn Company was subrogated to the rights of the bank and thus able to take advantage of the "self-help" repossession provisions of K. S. A. 84-9-503.

On the record presented the appellees are entitled to judgment as a matter of law. The judgment of the trial court is affirmed.

MILLER, J., not participating.

APPENDIX "B"

Trial Court's
Memorandum of Decision
January 24, 1974

On December 14, 1973, defendants' motions for summary judgment were presented to the court upon oral arguments and briefs. The motions were taken under advisement.

The Court in determining the motions was required to search the record to determine if any factual issues exist and if any genuine issue of material fact are found. Secrist v. Turley, 196 Kan. 576, 412 P.2d 976. The court must resolve against the movants when any doubt exists whether there remains a genuine issue of material fact, and the evidentiary material presented by the party opposing the motion must be taken as true and he must be given the benefit of all reasonable inferences therefrom. Weber v. Southwestern Bell Telephone Co., 209 Kan. 273, 497 P.2d 118.

The court is of the opinion that such doubt exists in regard to the question as to whether the repossession by Mr. Kuhn was performed in a legal manner. In this regard the court is of the opinion that the "self help" provision of K.S.A. 84-9-503, although allowing the creditor to go upon the premises of the debtor to repossess the security, (69 Am.Jur.2d Secured Transactions, sec. 595) is limited to that the secured party must not take possession by the use of force, threats or violence, nor "by the use of fraud or stealth". Motor Equipment Co. v. McLaughlin, 156 Kan. 258, 133 P.2d 149. The issue for trial in determining the legal manner of the repossession is whether Mr. Kuhn obtained the repossession by stealth, that is, by secret procedure or action. Put in another way, there is an issue as to whether he purposefully went to plaintiff's residence when he knew plaintiff was not at home in order to repossess the security in his absence. In this regard, the question of consent of plaintiff becomes important and this too is a disputed genuine issue of material fact as is the question of defendant Kuhn being an agent of defendant Bank.

The defendants' motions are therefore overruled.

Questions of law defined in defendants' motions and capable of solution at this time are resolved as follows:

1. The "self help" provision of K.S.A. 84-9-503 does not violate due process requirements of the Constitution. Repossession by self help is an alternate method allowed, but not required, a creditor to obtain security upon default. The self help provisions of the statute codifies the creditor's rights under common law and does not involve state action held objectionable by the Fuentes decision. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983; Adams v. Southern California First National Bank, No. 72-1487, (CA9, Oct. 4, 1973); Bichel Optical Laboratories v. Marquette Natl. Bank of Minneapolis, No. 73-1330 (CA8,

Nov. 7, 1973). See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 indicating that "state action" could not be found unless the state had significantly involved itself.

2. The defendant Kuhn as a guarantor of plaintiff's obligation to defendant Bank was subrogated to the rights of the bank and became a secured party to the extent of the July, 1972, payment and had the right to repossess the property in question. K.S.A. 84-9-504(c); K.S.A. 84-1-103. The only party who could object to defendant Kuhn exercising its rights as a secured party to repossess the security under the subrogation statute would be defendant Bank. United States Fidelity & Guarantee Co. v. Maryland Casualty Co., 186 Kan. 637, 352 P. 2d 70.

Dated this 24th day of January, 1974.

/s/ James W. Paddock
District Judge

A P P E N D I X " C "

Trial Court's
Memorandum of Decision
April 10, 1974

This matter is again before the court on defendants' motion to reconsider the court's prior ruling.

On January 24, 1974, the court in ruling on defendants' motion for summary judgment indicated that if defendant Kuhn, by its agent, purposefully went to plaintiff's residence when it was known plaintiff was not at home in order to repossess the security in his absence, then defendant Kuhn would have wrongfully repossessed the property. The court indicated in its opinion that such action, if shown to exist, would constitute "stealth" which would or could result in a breach of the peace.

A review of the annotation in 99 ALR 2d 358 and cases cited therein affirms the court's opinion that the repossession of property by a secured party by means of stealth could constitute action that could be, or could in likelihood lead to, a breach of the peace.

The court did however err in its ruling on what would constitute stealth. Even plaintiff's citations indicate stealth not only includes a lack of knowledge on the part of the victim, but also the secret, surreptitious, clandestine or furtive acts or behavior of the repossessor. The mere lack of knowledge or lack of consent of the debtor in the creditors repossessing the security is not repossession by stealth. G.M.A.C. v. Vincent, 183 Okla. 400, 83 P.2d 539. Stealth, in the legal sense, would constitute acts that have the characteristics of theft or robbery. Wilson Motor Co. v. Dunn, 129 Okla. 211, 264 Pac. 194.

If in fact Kuhn had gone to plaintiff's home to repossess the property knowing plaintiff was not at home, the undisputed facts of this case show his action and behavior was not those that would constitute stealth.

A further review of the record would indicate that the following facts are either not disputed or, in the event a dispute exists, are resolved in plaintiff's favor for purposes of reconsideration of defendants' motion for summary judgment.

1. On June 15, 1971, plaintiff executed a note and security agreement to defendant bank for $4,096.73 with interest at 9% per annum. The security agreement granted defendant bank a security interest in the following described personal property:

1971 New Holland No. 490 Hay Conditioner
(1) Dempster grain drill
(1) I.H.C. 71 Cadet No. 170577 with 38 inch mower
(1) I.H.C. 101 Combine with corn and grain heads

2. Plaintiff paid $100.00 on the note and the balance of $3,996.73 was to be paid in the amounts, plus interest, and on the dates as follows:

8-15-71	$300.00
11-20-71	400.00
7- 1-72	900.00
9- 1-72	300.00
9- 1-73	300.00
7- 1-74	896.73

3. The security agreement provided that upon default the secured party shall have the right to immediate possession of the security and, either upon default or if it deems itself insecure, the secured party shall have the remedies of a secured party under the Kansas Uniform Commercial Code.

4. The defendant Kuhn endorsed the note as a guarantor pursuant to K.S.A. 84-3-416 guaranteeing the payments to defendant bank. Defendant Kuhn's endorsement was placed on the back of the note and security agreement, at the bottom thereof, after execution of the note and security agreement by plaintiff without his knowledge. No other additions or changes were made in said note and security agreement.

5. Plaintiff made the first two payments as specified by the note and was current in payments through June, 1972. The initial two payments, although late, had been accepted by defendant bank with late charges or interest added to the required payment.

6. The payment of $900.00 and interest due July 1, 1972, was not paid by plaintiff, but during the month of July, 1972, plaintiff paid $400.00 to defendant Kuhn who in turn paid the $400.00 to defendant

Bank on July 18, 1972. At the time plaintiff made the $400.00 payment to defendant Kuhn, plaintiff informed an officer of defendant Kuhn that when he got back to work he would get the payment to defendant Kuhn. The officer of defendant Kuhn told plaintiff this was all right as long as he got the payment to him.

7. On demand of defendant Bank, defendant Kuhn on August 9, 1972, paid the remaining $500.00 and interest due on the July 1, 1972 payment to defendant Bank. Plaintiff did not reimburse defendant Kuhn for this payment.

8. The $300.00 payment and interest due September 1, 1972, was not paid by plaintiff.

9. On July 27, 1972, defendant Bank sent plaintiff a letter to the effect that unless the July 1, 1972, payment was made in full on or before August 2, 1972, defendant Kuhn was instructed to pick up the equipment.

10. On or about August 31, 1972, Louis Kuhn an officer of defendant Kuhn started out to plaintiff's home to either obtain the money owed defendant Kuhn or to pick up the equipment securing the note. On the way he passed plaintiff going in the opposite direction toward town. Kuhn turned and followed plaintiff to the parking lot of Kansas Color Press where plaintiff's wife was employed. A discussion took place between plaintiff and Kuhn concerning plaintiff making payments or returning the security. Plaintiff's version of this conversation was that if

plaintiff couldn't get the money he would bring the security back, and if he didn't get the money by the following Saturday, he might bring it in on Saturday.

11. Plaintiff made no payment nor did he bring in the equipment and was in default on the September, 1972 payment. Kuhn and one Fremont Hornberger went to plaintiff's home on the afternoon of September 5, 1972, between 3:30 and 4:30 p.m. Plaintiff and his wife were not at home. The plaintiff's two sons, ages 17 and 13, and a daughter, age 15, were at the house. Kuhn went to the door of plaintiff's house and asked the children to let him pick up the equipment. Neither Kuhn or Hornberger used any threats or violence, nor were the children physically touched. No threatening language was used against them.

12. The hay conditioner was in the driveway in front of the barn. The Cadet mower was in the barn. Plaintiff's sons helped Kuhn get the Cadet mower and the hay conditioner. A carburetor was not on the mower and Kuhn picked up a carburetor lying near the mower that turned out to be off a motor scooter that belonged to plaintiff's son.

13. On September 5, 1972, Kuhn did not have to pass through any enclosure getting from the road to plaintiff's house.

The following claims made by plaintiff will be reviewed and the entire record searched to determine if there is any issue as to a material fact, and if not defendants are entitled to judgment as a matter of law.

1. The security agreement of June 15, 1971, between plaintiff and defendant Bank was modified by an oral agreement made during the month of July, 1972. In this regard plaintiff claims that the modification occurred at the time plaintiff paid $00.00 (sic) to defendant Kuhn as a partial payment of the $900.00 payment that was due July 1, 1972, and Kuhn told plaintiff to pay the balance to defendant Kuhn. In the event defendant Kuhn was acting in its own behalf and not as the bank's agent, an officer of defendant Kuhn could not as a matter of law modify a contract between plaintiff and defendant Bank. In the event defendant Kuhn was the agent of defendant Bank, the statement by its officer for plaintiff to make the balance of payments to defendant Kuhn could not create any modification that would result in plaintiff not being in default in payments on September 5, 1972.

Plaintiff states that defendant Kuhn's officer, when told by plaintiff that he would get the payment to defendant Kuhn when he got back to work, stated it was all right as long as he got the payment to him. In such event if defendant Kuhn through its officer was acting as agent for defendant Bank, such statement could not as a matter of law amount to an oral contract that could modify the contract between plaintiff and defendant Bank if it was not supported by consideration. Plaintiff makes no claim that additional consideration passed between him and Kuhn other than the conversation reported in his deposition, nor can the existance (sic) of such fact be reasonably inferred.

Arensman v. Kitch, 160 Kan. 783, 167 P. 2d 441; 17 Am.Jur.2d Contracts, sec. 469. The granting of an additional period of time in which to make a past due payment, standing alone, does not constitute consideration. 17 Am.Jur.2d Contracts Sec. 474-481.

In plaintiff's deposition plaintiff made reference to the guarantee of Kuhn endorsed on the security agreement as constituting a modification thereof. The endorsement of Kuhn as a guarantor on the security agreement did not modify plaintiff's agreement with defendant Bank.

2. In the event defendant Kuhn was not an agent of defendant Bank, Kuhn had no right as guarantor to repossess the equipment. In this regard there is no issue as to the fact that defendant Kuhn paid defendant Bank the $500.00 balance due on the July, 1972, payment on or about August 9, 1972. As indicated in the January 24, 1974, memorandum, defendant Kuhn as guarantor of plaintiff's obligation to defendant Bank became subrogated to the rights of the Bank as a secured party to the extent of the balance of the July, 1972, payment and as between defendant Kuhn and plaintiff had the right to repossess the property. K.S.A. 84-9-504(c); K.S.A. 84-1-103; United States Fidelity & Guarantee Co. v. Maryland Casualty Co., 186 Kan. 637, 352 P. 2d 70.

Since the parties to this action agree that the payment due September 1, 1972, was not made by plaintiff to either defendant Bank or to defendant Kuhn then

defendant Kuhn, if he were acting on September 5, 1972, as the Bank's agent, would by the terms of the security agreement, be authorized to repossess the equipment for the Bank.

3. The repossession was effected by defendants in an unlawful manner. As to this claim the initial determination is whether there is an issue as to any material fact as to the manner of repossession. If there is no issue as to fact, then a determination of legality as a matter of law would make a further determination of the existence of a principal-agent relationship between defendant Bank and defendant Kuhn of no importance. On the other hand a determination of either illegality of repossession or that there exists an issue of material fact as to the legality of the repossession would make the agency relationship a material issue in the case.

A. In regard to plaintiff's claim that "self-help" provision of K.S.A. 84-9-503 violates due process requirements of the Constitution, the court affirms its conclusions in that regard as set out in paragraph numbered 1 in its Memorandum of Decision of January 24, 1974, in holding that such provision does not violate due process requirements.

B. The issues that exist in regard to the repossession of the equipment in this case are issue of law rather than of fact. There is no claim made by plaintiff that Kuhn and Hornberger used force or threats in obtaining repossession of the equipment. Plaintiff's deposition and

statements of plaintiff's counsel at pre-trial have admitted no threats, violence, physical touching or threatening language was used. Plaintiff contends however that defendant Kuhn's officer had to have consent in order to go upon his property to repossess the equipment. He further contends that plaintiff did not give such consent and that plaintiff's 17 year old son could not, as a matter of law, consent.

The provision of K.S.A. 84-9-503 would allow a secured party to enter the debtor's premises to effect repossession of the collateral as long as there is no breach of the peace. 69 Am.Jur.2d Secured Transactions sec. 595. The absence of consent alone does not constitute a breach of peace. It is only where the debtor or the person in charge at the residence objects to the "self help" repossession that resort to legal process is required. 69 Am.Jur.2d Secured Transactions sec. 594. Plaintiff makes no claim that the repossession in this case was resisted or that the request made by Kuhn to pick up the equipment at plaintiff's residence was refused, nor can such claim be inferred from any deposition testimony in the case.

The opening of the barn by plaintiff's son to allow Kuhn and Hornberger to enter and their entry and removal of the Cadet mower cannot be said to constitute a conversion, trespass, or a breach of the peace absent force or threats on their part.

C. The plaintiff claims that he was the owner of a Cushman Motor Scooter

carburetor that was taken by Kuhn when repossessing the Cadet mower. His deposition testimony stated that the motor scooter belonged to his son. Any cause of action in such case would be that of the son.

The search of the record reveals the only factual issues that may exist is that of principal-agent relationship between defendants Bank and Kuhn. The determination of legal issues show the issue of fact is not a material one and that defendants are entitled to judgment as a matter of law. (See Weber v. Southwestern Bell Telephone Co., 209 Kan. 273 at 281-282)

The Clerk of this court shall enter the following judgment:

The defendants' motions to reconsider the decision of the court of January 24, 1974, is granted and upon reconsideration it is the judgment of the court that defendants' motions for summary judgment be sustained.

/s/ James W. Paddock
District Judge

A P P E N D I X " D "

Notice of Appeal to The
Supreme Court of the United States

Notice is hereby given that Don Benschoter, the appellant above-named, hereby appeals to the Supreme Court of the United States from the complete opinion and final decision of the Supreme Court of Kansas upholding the constitutionality of K.S.A. 84-9-503, entered in this action on November 8, 1975.

This appeal is taken pursuant to Title 28, United States Code, §1257, subparagraph 2.

Dated: February 5, 1976.

FILED

FEB 5 - 1976

LEWIS C. CARTER
CLERK SUPREME COURT

/s/ Robert E. Tilton
/s/ Fred W. Phelps

Attorneys for
Appellant.

Certificate of Service

I hereby certify that a conformed copy of the above and foregoing "Notice of Appeal to the Supreme Court of the United States" was regularly mailed on this 5th day of February, 1976, to the following:

1. Richard L. Zinn, Esq. of BARBER, EMERSON, SIX, SPRINGER & ZINN, Lawrence National Bank Building, Lawrence, Kansas 66044, attorney for appellee The First National Bank of Lawrence; and,

2. Gerald L. Cooley, Esq., of ALLEN & COOLEY, First National Bank Building, Lawrence, Kansas 66044, attorney for appellee Kuhn Truck and Tractor Company, Inc.

/s/ Robert E. Tilton
/s/ Fred W. Phelps

Attorneys for
Appellant.

APPENDIX "E"

Proof of Service

Affidavit of Mailing

State of Kansas)
)SS
County of Shawnee)

The undersigned, Fred W. Phelps, of lawful age, and being first duly sworn upon his oath, deposes and says:

That he is a member of the Kansas bar, and co-counsel herein; that he did on the 6th day of February, 1976, cause to be regularly mailed three (3) printed copies of the jurisdictional statement herein, by depositing same in the United States Post Office at Topeka, Kansas, first class postage prepaid, addressed to all adverse counsel of record herein as follows:

1. Richard L. Zinn, Esq. of BARBER, EMERSON, SIX, SPRINGER & ZINN, Lawrence National Bank Building, Lawrence, Kansas 66044 (attorney for appellee The First National Bank of Lawrence), and;

2. Gerald L. Cooley, Esq. of ALLEN & COOLEY, First National Bank Building, Lawrence, Kansas 66044 (attorney for appellee Kuhn Truck and Tractor Company, Inc.).

Fred W. Phelps
FRED W. PHELPS

Subscribed and sworn to before me this 6th day of February, 1976.

BETTY JOAN PHELPS NOTARY PUBLIC STATE SHAWNEE COUNTY, KANSAS

Betty Joan Phelps
BETTY JOAN PHELPS
Notary Public

My Commission expires: June 5, 1978.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1118

DON BENSCHOTER,

Appellant,

vs.

THE FIRST NATIONAL BANK OF LAWRENCE and KUHN TRUCK AND TRACTOR COMPANY, INC.,

Appellees.

On Appeal From The Supreme Court of Kansas

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

October Term, 1975

No. 75-1118

DON BENSCHOTER,

Appellant,

vs.

THE FIRST NATIONAL BANK OF LAWRENCE and KUHN TRUCK AND TRACTOR COMPANY, INC.

Appellees.

On Appeal From The Supreme Court of Kansas

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the appellee, Kuhn Truck and Tractor Company, Inc., moves the court to dismiss the appeal herein taken from the decision of the Supreme Court of Kansas on the ground that it does not present a substantial federal question. Further, this appellee moves that the appeal herein be dismissed or, in the alternative, that the decision of the Supreme Court of Kansas, be affirmed on the ground that the overwhelming weight of state and federal decisions involving the issues on appeal are supportive of this appellee's motion and no further argument thereon should be entertained.

I.
STATEMENT OF THE CASE

The sole question presented by the appellant in this appeal is whether the "self-help" provision of the Kansas Uniform Commercial Code, K.S.A. 84-9-503, the text of which is set forth on page 2 of appellant's jurisdictional statement, is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

II.
ARGUMENT

The due process clause of the Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of life, liberty or property, without due process of law. To invoke the provisions of this clause, there must be established requisite state action, as the conduct of private individuals is outside of and not controlled by the Fourteenth Amendment, Shelby v. Kreamer, 334 U.S. 1, 13, 92 L.Ed. 1161, 68 S.Ct. 836.

The case at bar involves the "self-help" repossession of security by a secured creditor from a defaulting debtor without the creditor invoking the aid or assistance of the courts or any officer thereof (see pages 3 and 4 and appendices "A" and "C" of appellant's jurisdictional statement). The Federal Circuit Courts have consistently held that the requisite state action is not present in ordinary "self-help" repossession cases such as the one at bar. Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974), cert. denied 419 U.S. 1039, 42 L.Ed.2d 316, 95 S.Ct. 526; Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974), cert. denied, 419 U.S. 1006, 42 L.Ed.2d 283, 95 S.Ct. 328; Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1974), cert. denied, 419 U.S. 1006, 42 L.Ed.2d 282, 95 S.Ct. 325.

This court was called upon to grant certiorari in the Gibbs, Nowlin and Adams cases, supra, wherein

the same due process arguments were urged upon the court as are present in the instant case. However, this court in each case denied certiorari thus sustaining the abundance of state and federal court cases which have upheld the constitutionality of Section 9-503 of the Uniform Commercial Code. See: Brown v. United States National Bank of Oregon, 509 P.2d 442 (Ore. 1973); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 195 A.2d 402, 405 (1972); Pease v. Havelock National Bank, 351 F.Supp. 118 (D.C. Neb., 1972); Kirksey v. Theilig, 351 F.Supp. 727 (D.C. Colo. 1972); Bichel Optical Lab, Inc., v. Marquette National Bank of Minneapolis, 487 F.2d 906 (8th Cir. 1973); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Johnson v. Associates Finance, Inc., 365 F.Supp. 1380 (S.D. Ill. 1973); Northside Motors of Florida, Inc., v. Brinkley, 282 So.2d 617 (Fla. 1973); Emmons v. Easter, 62 Mich. App. 226, 233 N.W.2d 239 (1975).

Appellant, at page 5 of his jurisdictional statement, has cited Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), in his attempt to have this case set for argument. These authorities are not germane to appellant's case because the court in each instance found sufficient "State" or "Governmental Action" so as to invoke the due process guarantees. In this case, and the many others concerning "self-help" repossession which have been previously cited, there is not, nor was there, an involvement of "State Action" sufficient to invoke the provision of the due process clause. One can only imagine the utter chaos that might befall all levels of the judicial system if every act of the private individual was required to be presented for judicial scrutiny on the issue of a failure of due process requirements.

III.
CONCLUSION

The appellee, Kuhn Truck and Tractor Company, Inc., respectfully submits that this appeal should

be dismissed for the reason that it does not present a substantial federal question. Further, this appellee submits that this appeal should be dismissed or, in the alternative, the decision of the Supreme Court of the State of Kansas should be affirmed on the ground that the overwhelming weight of prior federal and state court decisions concerning the issue on appeal are supportive of this appellee's motion and that no further argument of the point is necessary.

Respectfully submitted,

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Attorneys for Appellee, Kuhn Truck and Tractor Company, Inc.

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1118

DON BENSCHOTER,
Appellant,

vs.

THE FIRST NATIONAL BANK OF LAWRENCE and KUHN TRUCK AND TRACTOR COMPANY, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS OR AFFIRM

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THE FIRST NATIONAL BANK OF LAWRENCE and KUHN TRUCK AND TRACTOR COMPANY, INC.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS OR AFFIRM

Appellee The First National Bank of Lawrence, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the instant appeal on the grounds that the appeal is not within the Court's jurisdiction as not taken in conformity with the Rules of this Court, and that this appeal does not present a substantial federal question. This appellee further moves that this appeal be dismissed or, in the alternative, that the judgment of the Supreme Court of Kansas be affirmed, on the ground that prior decisions of federal and state courts have so clearly settled the issues on which the decision of this cause depends that no further argument is necessary.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal draws into question the validity of K.S.A. 84-9-503, commonly known as the "self-help" repossession section of the Uniform Commercial Code, the full text of which statute is reproduced at page 2 of appellant's jurisdictional statement. The question presented is whether K.S.A. 84-9-503, a statutory codification of the common-law right of a creditor to repossess collateral after his debtor's default, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

B. The Proceedings Below.

The Court's attention is invited to pages two, three and four of the opinion below, *Benschoter* v. *First Nat'l. Bank of Lawrence et al.*, 218 Kan. 144, 542 P.2d 1042 (1975) (218 Kan. 145-147), which opinion appears within appellant's Appendix "A".

II.

ARGUMENT

A. The Instant Appeal is not within the Court's Jurisdiction, as the Appeal was not taken in Conformity with the Rules of this Court.

Rule 10(2) of this Court states that a copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 33, and proof of such service shall be filed with the notice of appeal. On February 6, 1976, appellees received a

copy of appellant's notice of appeal, an exact copy of which notice, as received by appellees, appears in Appendix A hereto (one certified copy has also been forwarded to the Clerk of this Court). An examination of the method of proof of service utilized by appellant's counsel reveals that proof of service was attempted to be shown by a certificate of service pursuant to Rule 33(3)(b). This Rule was not, however, complied with, as Fred W. Phelps, the attorney who signed the certificate of service, *was not at that time a member of the Bar of this Court.* Under such circumstances, service should have been proven in accordance with Rule 33(3)(c), by utilization of an affidavit of service. Interestingly, in appellant's jurisdictional statement, which contains what purports to be a true copy of the notice of appeal and certificate of service thereof (see Appendix "D" of appellant's jurisdictional statement), the signature of Robert E. Tilton, who was a member of the Bar of this Court on February 5, 1976, when proof of service was attempted to be shown, appears together with that of Mr. Phelps (see page 2 of appellant's Appendix "D"). The copy of appellant's certificate of service of the notice of appeal set out in the jurisdictional statement does not, therefore, conform to the certificate of service shown on the notice of appeal filed in the Kansas Supreme Court, which was signed only by Fred W. Phelps. This appellee has no information that can adequately explain or account for this serious discrepancy. In summary, however, whatever the cause of the discrepancy, the attempted proof of service, as such appeared when received by this appellee, was defective.

Although this appellee is aware of this Court's holding in *Parker* v. *Levy*, 417 U.S. 733 (1974), relative to

the issue of technical noncompliance with Rule 33, it is this appellee's position that the discrepancy between the one signature appearing on the original notice of appeal and the two signatures contained in appellant's jurisdictional statement removes this issue from the "technical" category, and merits the Court's consideration of this issue in the present appeal. Since appellant has failed to comply with the Rules of this Court in perfecting his appeal, this Court has no jurisdiction to hear the same, and the appeal should, therefore, be dismissed.

B. The Instant Appeal Fails to Present either a Substantial Federal Question or any Issue That has not been Resolved by Prior Decisions of Numerous Federal and State Courts.

This Court has recently had the opportunity to grant certiorari in four different appeals involving the precise question presented herein, i.e. the constitutionality of Section 9-503 of the Uniform Commercial Code: *Gibbs* v. *Titelman*, 502 F.2d 1107 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974); *Brantley* v. *Union Bank and Trust Co.* (consolidated with *Baker* v. *Keeble*), 498 F.2d 365 (5th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Nowlin* v. *Professional Auto Sales, Inc.* (consolidated with *Mayhugh* v. *Bill Allen Chevrolet*), 496 F.2d 16 (8th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974); and *Adams* v. *Southern California First Nat'l. Bank*, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974). The substantial number of reported cases upholding the constitutionality of this statute (see Appendix B hereto) indicates that not only is there no conflict among the federal circuit courts of appeal on this question, but that there is also little conflict among the many federal and state courts, both appellate and inferior, that have considered this issue. In short, the overwhelming judicial consensus has been in favor of the constitutionality of Section 9-503 of the Uniform Commercial Code, rendering further argument on this issue unnecessary. As stated by Mr. Justice White in his dissent in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) at 103:

> The Uniform Commercial Code, which now so pervasively governs the subject matter with which it deals, provides in Art. 9, § 9-503, that: . . . (partial text of statute) . . . Recent studies have suggested no changes in Art. 9 in this respect. See permanent editorial board for the Uniform Commercial Code, review committee for Art. 9 of the Uniform Commercial Code, final report, § 9-503 (April 25, 1971). I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislators that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

A thorough examination of the decisions in this area reveals that the result in favor of constitutionality has been reached because it has been impossible to find the requisite state action that would produce a deprivation of property without due process. The lack of state action has been found primarily as a result of the consideration of two factors: (1) The common law origin of the right of self-help repossession, and (2) the lack of any entwinement on the part of the state with the physical act of repossession so that the type of deprivation of due process invalidated in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) and its progeny, including *Fuentes* v. *Shevin*, *supra*, could possibly occur.

As previously stated, the right of self-help repossession is thoroughly founded in the common law (see page 5 of the opinion of the Supreme Court of Kansas (218 Kan. 148), contained in appellant's exhibit "A"). In *Fuentes* v. *Shevin, supra* (at 407 U.S. 79, n. 12), this Court observed that under the common law a creditor could proceed without the use of state power, through self-help, by "distraining" the collateral before judgment. The common law source of Section 9-503 has been considered to be of substantial importance in almost every Section 9-503 decision heretofore rendered, see particularly *Adams* v. *Southern California First Nat'l. Bank, supra,* and *Gibbs* v. *Titelman, supra.*

In addition to the fact that a mere codification of the common law cannot constitute state action, recent decisions of this Court clearly support a finding of no state action in the instant appeal. In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163 (1972), and *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974), much more logical circumstances existed for the arguable presence of state action than those appearing in the Section 9-503 controversy. Furthermore, it is presently quite clear that this Court has in recent years been restricting, or at least not expanding, the application of the "state action" doctrine to the acts of private individuals (see *State Action and the Burger Court,* 60 Va. L. Rev. 840, 841, 846-863 (1974); *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 Col. L. Rev. 656, 688-89 (1974)).

It is also important to note that this Court has very recently had the opportunity to grant certiorari in an appeal that presented a number of characteristics similar to those contained in the present appeal, *Anastasia* v. *Cosmopolitan Nat'l. Bank of Chicago et al.,* No. 74-

1995 (7th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3467 (U.S. Feb. 23, 1976) (the full text of this unreported opinion appears in Appendix C hereto). The *Anastasia* case involved the constitutionality of the Illinois innkeeper's lien law, which provides that a hotel proprietor shall have a lien upon all baggage and effects of his guests for any and all proper charges due him from such guests for hotel accommodations. The court below, in holding that it would not rule as to whether a deprivation of plaintiffs' property without due process could be found as no state action was present, actually cited a number of Section 9-503 cases, pointing out that the federal courts of appeals have unanimously held that Section 9-503 (and Section 9-504) of the Uniform Commercial Code do not present a basis for finding state action (see n. 11, Appendix C, pp. 18-19). Certainly one of the strongest similarities between the innkeeper's lien law and the right of self-help repossession is the fact that both types of statutes have deep roots in the common law. See Hogan, *The Innkeeper's Lien at Common Law,* 8 Hastings L.J. 33, 34-36 (1956).

The vitality of *Fuentes* v. *Shevin, supra,* cited by appellant at page 5 of his jurisdictional statement, has been rendered highly questionable by *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974), which held that a Louisiana statute allowing a secured party to obtain, without prior notice to the debtor or an opportunity for hearing, an *ex parte* writ of sequestration to forestall waste or alienation of encumbered property, under circumstances in which the debtor could immediately seek dissolution of the writ, was not constitutionally invalid. *Fuentes* has, quite arguably, been overruled by *Mitchell,* as pointed out by Mr. Justice Powell in his concurring opinion (at 416 U.S. 623). Mr. Justice

Stewart appears to be of the same view in his dissent (see 416 U.S. 635). While *Sniadach* v. *Family Finance Corporation, supra,* particularly in light of *North Georgia Finishing Co., Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601 (1975) continues to be of strong precedential value relative to its prohibition of prejudgment wage garnishments, the expansion of the *Sniadach* doctrine into the field of creditors' remedies in general would appear to have been severely limited by the *Mitchell* decision. Furthermore, in the event this Court reverses *Sugar* v. *Curtis Circulation Co.,* 377 F.Supp. 1055 (S.D. N.Y. 1974), probable jurisdiction noted at 421 U.S. 908 (1975), it appears likely that the *Fuentes* decision will have been either overruled or emasculated to the point where it is of no precedential validity.

In conclusion, self-help repossession by a Kansas creditor does not constitute state action, as K.S.A. 84-9-503 represents no more than a statutory codification or restatement of the common-law right recognized long before Section 9-503 of the Uniform Commercial Code was promulgated. The statute recognizes standard contract law, and is for all practical purposes insignificant to a repossession transaction. There is no encouragement of repossession by the state, as the statute merely codifies a long-established legal remedy. Since no state action exists, no due process infirmity can possibly be present. *Moose Lodge No. 107* v. *Irvis* and *Jackson* v. *Metropolitan Edison Co., supra.* These prior decisions of this Court, in addition to this Court's denial of certiorari in the *Anastasia, Gibbs, Brantley, Baker, Nowlin, Mayhugh* and *Adams* cases, *supra,* clearly indicate that no substantial federal question is presented by the instant appeal. Furthermore, in light of the overwhelming judicial consensus in favor of the

constitutionality of Section 9-503, the issues presented by this appeal have been so clearly determined that no basis exists for further consideration of such issues by this Court.

III.

CONCLUSION

Appellee The First National Bank of Lawrence submits that this appeal should be dismissed on the grounds that the appeal was not taken in conformity with the rules of this Court, and that this appeal does not present a substantial federal question. This appellee further submits that this appeal should be dismissed or, in the alternative, that the judgment of the Supreme Court of Kansas should be affirmed, on the ground that prior decisions of federal and state courts have so clearly settled the issues on which the decision of this cause depends that no further argument is necessary.

Respectfully submitted,

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RICHARD L. ZINN
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Lawrence, Kansas 66044
Attorneys for Appellee The First National Bank of Lawrence

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF KANSAS

DON BENSCHOTER,

Appellant,

-vs-

FIRST NATIONAL BANK OF LAWRENCE, A Corporation, and KUHN TRUCK & TRACTOR COMPANY, INC., A Corporation,

Appellees.

Case No. 47,761

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Don Benschoter, the appellant above-named, hereby appeals to the Supreme Court of the United States from the complete opinion and final decision of the Supreme Court of Kansas upholding the constitutionality of K.S.A. 84-9-503, entered in this action on November 8, 1975.

This appeal is taken pursuant to Title 28, United States Code, §1257, subparagraph 2.

Dated: February 5, 1976.

Robert E. Tilton

ROBERT E. TILTON

FRED W. PHELPS - CHARTERED

By: Fred W. Phelps

FRED W. PHELPS
3701 W. 12th Street
Topeka, Kansas 66604
913/273-1420
Attorney for Appellant.

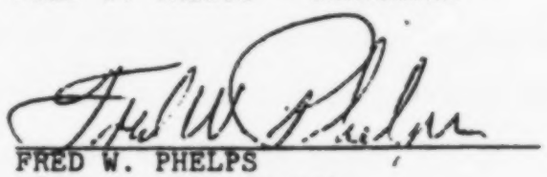
CERTIFICATE OF SERVICE

I hereby certify that a conformed copy of the above and foregoing "Notice of Appeal to the Supreme Court of the United States" was regularly mailed on this 5th day of February, 1976, to the following:

1. Richard L. Zinn, Esq. of BARBER, EMERSON , SIX, SPRINGER & ZINN, Lawrence National Bank Building, Lawrence, Kansas 66044, attorney for appellee The First National Bank of Lawrence; and,

2. Gerald L. Cooley, Esq. of ALLEN & COOLEY, First National Bank Building, Lawrence, Kansas 66044, attorney for appellee Kuhn Truck and Tractor Company, Inc.

FRED W. PHELPS - CHARTERED

By: 

FRED W. PHELPS
3701 W. 12th Street
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Attorney for Appellant.

APPENDIX B

The following decisions have upheld the constitutionality of Section 9-503 of the Uniform Commercial Code: *Gibbs* v. *Titelman*, 502 F.2d 1107 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974); *Brantley* v. *Union Bank and Trust Co.* (consolidated with *Baker* v. *Keeble*), 498 F.2d 365 (5th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Shirley* v. *State Nat'l. Bank*, 493 F.2d 739 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974) (Connecticut statute virtually identical to 9-503 in purpose and effect); *Nowlin* v. *Professional Auto Sales, Inc.* (consolidated with *Mayhugh* v. *Bill Allen Chevrolet*), 496 F.2d 16 (8th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974); *Adams* v. *Southern California First Nat'l. Bank*, 492 F.2d 324 (9th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974); *Calderon* v. *United Furniture Co.*, 505 F.2d 950 (5th Cir. 1974); *Gary* v. *Darnell*, 505 F.2d 741 (6th Cir. 1974); *Turner* v. *Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Nichols* v. *Tower Grove Bank*, 497 F.2d 404 (8th Cir. 1974); *James* v. *Pinnix*, 495 F.2d 206 (5th Cir. 1974); *Bichel Optical Lab., Inc.* v. *Marquette Nat'l. Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973); *Teitelbaum* v. *Scranton Nat'l. Bank*, 384 F.Supp. 1139 (M.D. Penn. 1974); *McDuffy* v. *Worthmore Furniture, Inc.*, 380 F.Supp. 257 (E.D. Va. 1974); *Kinch* v. *Chrysler Credit Corp.*, 367 F.Supp. 436 (E.D. Tenn. 1973); *Johnson* v. *Associates Finance, Inc.*, 365 F.Supp. 1380 (S.D. Ill. 1973); *Shelton* v. *General Electric Credit Corp.*, 359 F.Supp. 1079 (M.D. Ga. 1973); *Colvin* v. *Avco Financial Services of Ogden, Inc.*, 12 UCC Rep. 25 (D. Utah 1973); *Kirksey* v. *Theilig*, 351 F.Supp. 727 (D. Colo. 1972); *Pease* v. *Havelock Nat'l. Bank*, 351 F.Supp. 118 (D. Neb. 1972); *Green* v. *First Nat'l. Exch. Bank of Virginia*, 348 F.

Supp. 672 (W.D. Va. 1972); *Oller* v. *Bank of America*, 342 F.Supp. 21 (N.D. Cal. 1972); *McCormick* v. *First Nat'l. Bank of Miami*, 322 F.Supp. 604 (S.D. Fla. 1971); *Faircloth* v. *Old Nat'l. Bank of Washington*, 86 Wash. 2d 1, 541 P.2d 362 (1976); *Benschoter* v. *First Nat'l. Bank of Lawrence*, 218 Kan. 144, 542 P.2d 1042 (1975); *Emmons* v. *Easter*, 62 Mich. App. 226, 233 N.W.2d 239 (1975); *Hill* v. *Michigan Nat'l. Bank of Detroit*, 58 Mich. App. 430, 228 N.W.2d 407 (1975); *Rainey* v. *Ford Motor Credit Co.*, ... Ala. ....., 313 So.2d 179 (1975); *King* v. *South Jersey Nat'l. Bank*, 66 N.J. 161, 330 A.2d 1 (1974); *John Deere Co. of Kansas City* v. *Catalano*, ... Colo. ....., 525 P.2d 1153 (1974); *Cook* v. *Lilly*, ... W.Va. ....., 208 S.E.2d 784 (1974); *A & S Excavating, Inc.* v. *International Harvester Credit Corp.*, 31 Conn. Sup. 152, 325 A.2d 535 (1974); *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So.2d 617 (Fla. 1973); *Giglio* v. *Bank of Delaware*, 307 A.2d 816 (Del. Ch. 1973); *Frost* v. *Mohawk Nat'l. Bank*, 74 Misc.2d 912, 347 N.Y.S.2d 246 (1973); *Brown* v. *United States Nat'l. Bank of Oregon*, 265 Ore. 234, 509 P.2d 442 (1973); *Kipp* v. *Cozens*, 11 UCC Rep. 1067 (Cal. Sup. 1972); and *Chrysler Credit Corp.* v. *Tremer*, 48 Ala. App. 675, 267 So.2d 467 (1972).

The following decisions have found Section 9-503 to be constitutionally infirm: *Watson* v. *Branch County Bank*, 380 F.Supp. 945 (W.D. Mich. 1974); *Thompson* v. *Keesee*, 375 F.Supp. 195 (D. Ky. 1974); and *Boland* v. *Essex County Bank and Trust Co.*, 361 F.Supp. 917 (D. Mass. 1973).

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1995

ANN ANASTASIA, et al.,

Plaintiffs-Appellants,

vs.

THE COSMOPOLITAN NATIONAL BANK OF CHICAGO, etc., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 72 C 2303
FRANK J. McGARR, *Judge.*

ARGUED JUNE 6, 1975 — DECIDED SEPTEMBER 30, 1975

Before MOORE, *Senior Circuit Judge,** CUMMINGS, and BAUER, *Circuit Judges.*

MOORE, *Senior Circuit Judge:* Illinois Revised Statutes ch. 82, §57[1] and ch. 71, §2[2] give hotelkeepers a lien on the

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* Senior Circuit Judge Leonard Page Moore of the United States Court of Appeals for the Second Circuit was sitting by designation.

[1] The statute provides:
Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders, for the proper charges due from such guests or boarders, for their accomodations, board and lodgings and such extras as are furnished at their request.

[2] The statute provides:
Every hotel proprietor shall have a lien upon all the baggage and effects brought into said hotel by his guests for any and all

personal property brought into their establishments by guests to the extent of charges incurred for lodging, board or other services.[3] Ch. 71, §2 also authorizes the hotelkeeper to detain and eventually, upon continued nonpayment of charges, after notice to the guests[4] to sell such property in order to realize on the lien. Such a sale bars any subsequent action against the hotel proprietor for the recovery of the property or the value thereof. This case represents a constitutional challenge to these provisions.

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[2] (Continued)

> proper charges due him from such guests for hotel accommodations, and said hotel proprietor shall have the right to detain such baggage and effects until the amount of such charges shall have been fully paid, and unless such charges shall have been paid within sixty days from the time when the same accrued, said hotel proprietor shall have the right to sell such baggage and effects at public auction after giving ten days' notice of the time and place of such sale, by publication of such notice in a newspaper of general circulation in the county in which said hotel is situated, and also by mailing, ten days before such sale, a copy of such notice addressed to such guest at his post office address, if known to said hotel proprietor, and if not known, then to his place of residence registered by said guest in the register of such hotel; and after satisfying such lien out of the proceeds of such sale, together with any costs that may have been incurred in enforcing said lien, the residue of said proceeds of sale, if any, shall, within six months after such sale, on demand, be paid by said hotel proprietor to such guest; and if not demanded within six months from the date of such sale, such residue or remainder shall be deposited by such hotel proprietor with the county treasurer of the county in which such hotel is situated, together with a statement of such hotel proprietor's claim, the amount of costs incurred in enforcing the same, a copy of the published notice, and the amount received from the sale of said property so sold at said sale; and said residue shall, by said county treasurer, be accredited to the general revenue fund of said county, subject to the right of said guest or his representative to reclaim the same at any time within three years from and after the date of such deposit with said county treasurer, and such sale shall be a perpetual bar to any action against said hotel proprietor for the recovery of such baggage or property, or of the value thereof, or for any damages growing out of the failure of such guest to receive such baggage or property.

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[3] Ill. Rev. Stat. ch. 71, §4c defines "hotel" as follows:

> The word "hotel" within the meaning of this act includes every building or structure kept, used, maintained, advertised, and held out to the public to be a place where lodging, or lodging and food, or apartments, or suites, or other accommodations are offered for adequate pay to travelers and guests, whether transient, permanent, or residential, in which 25 or more rooms are used for the lodging, or lodging and food, or apartments, or suites, or other accommodations of such guests.

[4] Similar, but not identical, sale provisions for realization on the lien provided by ch. 57, §82 are contained in Ill. Rev. Stat. ch. 141, §3.

I.

The named plaintiffs in this class action were residents of hotels located in Chicago. In each instance they returned to their rooms one day to find that the hotelkeeper had either changed or "plugged" the lock on the door to the room so that the plaintiffs were unable to gain admittance. Upon inquiry, each plaintiff was told by their respective hotelkeepers that they would not be readmitted and the personal property that had been located in the room would not be released until such time as arrearages in rent had been paid. When efforts by the plaintiffs and their attorneys to regain possession of their property proved unavailing, this lawsuit was filed.[5]

The suit, brought under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, challenged the seizures of the personal possessions of the plaintiffs as both a deprivation of property without due process of law in violation of the Fourteenth Amendment in that no notice or hearing in which the plaintiffs could raise defenses to the alleged nonpayments of rent[6] was provided, and an unreasonable search and seizure in contravention of the Fourth Amendment. In addition to damages, the plaintiffs sought a declaration that ch. 82, §57 and ch. 71, §2 were unconstitutional and an injunction restraining the defendants from acting pursuant to these sections. On January 6, 1973, the district court granted leave to intervene as defendant to several of Chicago's large hotels, and on June 5, 1973, granted plaintiffs' motion to proceed as a plaintiff and defendant class action.[7]

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[5] The property of plaintiffs Anastasia and Smith has now been returned to them. Plaintiff Glass was offered the return of his property, but he refused to accept it on the ground that certain items were missing.

[6] *See North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant, Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

[7] The district court defined the plaintiff class as:

> Those persons in Chicago, Illinois, except for the owners, managers and operators of hotels, whose personal property is now detained by a hotel pursuant to the Illinois Innkeepers' Lien Law

The defendant class included:

> Those owners, managers, and operators of hotels in Chicago, Illinois, who now have the personal property of the class of plaintiffs detained pursuant to the Illinois Innkeepers' Lien Law.

After the plaintiffs had submitted a motion for summary judgment, the district court *sua sponte* raised the issue of state action and issued a memorandum dismissing the complaint for lack of jurisdiction upon concluding that the action of the defendant hotels was not taken "under color" of law within the meaning of 42 U.S.C. §1983.[8] From the judgment entered thereon, the plaintiffs appealed. We affirm.

Ever since the *Civil Rights Cases*, 109 U.S. 3 (1883), it has been recognized that the Fourteenth Amendment serves as a limitation only on governmental action and does not affect purely private conduct. But while this proposition is easily stated, the distinction between governmental and private action is seldom very clear. With increasing frequency in recent years, the federal courts have been drawn into the sphere of creditor-debtor relations to decide whether certain statutorily authorized creditor conduct constitutes action "under color of" state law within the meaning of section 1983,[9] or, what is essentially the same question,[10] whether the conduct is "state action" under the Fourteenth Amendment. A number of cases have considered the issue in the context of the self-help repossession remedy provided to secured creditors by sections 9-503 and 9-504 of the Uniform Commercial Code.[11] Only last

[8] We note that the proper disposition, given the district court's conclusion, would have been to dismiss the claims for failure to state a claim upon which relief could be granted. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Adams* v. *Southern California First National Bank*, 492 F.2d 324, 338 (9th Cir. 1973). *cert. denied*, 419 U.S. 1006 (1974).

[9] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[10] *United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966); *Phillips* v. *Money*, 503 F.2d 990, 992 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975).

[11] To cite only the cases decided by the Circuit Courts of Appeals, which have unanimously held that these provisions of the UCC are not a basis for finding state action: *Calderon* v. *United Furniture Co.*, 505 F. 2d 950 (5th Cir. 1974); *Brantley* v. *Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974); *James* v. *Pinnix*, 495 F.2d 206 (5th Cir. 1974); *Turner* v. *Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Gibbs* v. *Titelman*, 502 F.2d 1107 (3rd Cir.), *cert. denied*, 419 U.S. 1039 (1974); *Nichols* v. *Tower Grove Bank*, 497 F.2d

year this court considered an Indiana common law and statutory mechanic's lien, finding no state action where an automobile repairman detained a car after the owner refused to pay the bill for repairs. *Phillips* v. *Money*, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975). And the context in which the state action question in this case arises—detention of personal property pursuant to a statutory landlords' or innkeepers' lien—is by no means unique, having been the subject of a number of court decisions.[12] In fact, detention of property under authority of the very statutes challenged herein has in another case been declared unconstitutional by the United States District Court for the Northern District of Illinois. *Collins* v. *Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972).[13]

Before moving to an analysis of the plaintiffs' contentions, it is important to note that this case involves only the seizure of personal property by the defendant hotels. There have been no sales of the property of the named plaintiffs although ch. 71, §2 authorizes sales under certain conditions. And the plaintiff class is defined as "[t]hose persons . . . whose personal property is now detained by a hotel. . . ." (*See* note 7 *supra*). There is

[11] (Continued)
404 (8th Cir. 1974); *Nowlin* v. *Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); *Bichel Optical Laboratories, Inc.* v. *Marquette National Bank of Minneapolis*, 487 F.2d 906 (1974); *Adams* v. *Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). For related state action cases see also *Bryant* v. *Jefferson Savings & Loan Assn.*, 509 F.2d 511 (D.C. Cir. 1974); *Hardy* v. *Gissendaner*, 508 F.2d 1207 (5th Cir. 1975); *Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); *Bond* v. *Dentzer*, 494 F.2d 302 (2d Cir.), *cert denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

[12] *Davis* v. *Richmond*, 512 F.2d 201 (1st Cir. 1975) (innkeepers' lien; no state action); *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970) (landlords' lien; state action); *Johnson* v. *Riverside Hotel, Inc.*, 44 U.S.L.W. 2075 (S.D. Fla. 1975) (innkeepers' lien; state action); *Barber* v. *Rader*, 350 F. Supp. 183 (S.D. Fla. 1972) (landlords' lien; state action); *Klim* v *Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeepers' lien; state action); *Holt* v. *Brown*, 336 F. Supp. 2 (W.D. Ky. 1971) (landlords' lien; state action); *Blye* v. *Globe Wernicke Realty Co.*, 33 N.Y. 2d 15, 300 N.E. 2d 710, 347 N.Y.S. 2d 170 (1973) (innkeepers' lien; state action).

[13] The district court in this case cited *Collins*, which had not been brought as a class action, and although giving "great weight" to that opinion, noted that it was but "one of several opinions which stand on one side of a very definite split of authority" on this issue.

no mention made of a sale. Therefore, we have in this case no occasion to consider whether a statutorily authorized sale, with the concomitant bar on any subsequent action by a guest against a hotel proprietor for the recovery of any property or the value thereof, would constitute state action. *Cf. Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 656 (7th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 1114 (1973) (State had authorized electric company to enter private property but that authority had not been invoked in the case at bar; had it been invoked, "an entirely different issue would [have been] presented.") It is appropriate, however, to note Mr. Justice Clark's caveat made with regard to state action cases: "'Differences in circumstances . . . beget aproporiate differences in law. . . .'" *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 726 (1961), *quoting*, *Whitney* v. *Tax Commission*, 309 U.S. 530, 542 (1940).

The plaintiffs advance two theories under which they contend that state action is present in this case. The first might properly be termed an "entwinement"[14] theory whereby the state has assertedly significantly involved itself in the action of the hotelkeepers, so as to make the acts of these private individuals state action for the purposes of the Fourteenth Amendment and section 1983. The second theory is the so-called "public function" theory: that the State of Illinois has allowed hotel proprietors to perform a governmental function in enforcing their lien, and therefore that their actions must be governed by constitutional limitations.

A. *Entwinement*

The proper focus for determining whether state action exists under this theory was recently stated by the Supreme Court as follows:

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (holding that the termination of electric service

[14] *See* Clark & Landers, Sniadach, Fuentes *and Beyond*: *The Creditor Meets the Constitution*, 59 Va. L.Rev. 355, 379 (1973).

by a public utility for nonpayment of bills was not state action). The test is whether the state has significantly involved itself in the challenged conduct. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972). And a conclusion as to degree of involvement can be reached only by "sifting facts and weighing circumstances." *Burton* v. *Wilmington Parking Authority, supra*, 365 U.S. at 722.

The plaintiffs argue that by passing a statute authorizing the private seizure of the possessions of hotel residents, the State of Illinois has lent affirmative support and encouragement to hotel proprietors. They point out that ch. 71, §2 in particular has altered the nature of the common law innkeepers' lien by expanding the class of establishments which can invoke it—a fact acknowledged by the defendants. At common law, the lien existed only in favor of innkeepers—one who took in transient guests, was bound by law to do so, and was absolutely liable for injury to the guest's person or property. Keepers of boardinghouses or lodginghouses had no corresponding obligations and liabilities, and possessed no comparable lien until granted by statute.[15] Plaintiffs observe as well that Illinois has eliminated the principal *raison d'être* of the common law innkeepers' lien by placing dollar ceilings on the extent of a hotelkeeper's liability and for some types of property abolishing absolute liability by requiring a showing of fault on the part of the hotelkeeper. *See* Ill. Rev. Stat. ch. 71, §§1, 3, 3.1, 4.

Primary reliance is placed on *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), where the Supreme Court found state action in an amendment (art. 1, §26 [Proposition 14]) to the California constitution providing that the state could not limit a person's right to rent or sell real estate to whomever he chooses. A black couple had sued under California statutes providing for equal accommodations, alleging that the defendants had refused to rent them an apartment solely on account of their race. The trial court rendered summary judgment for the defendants on the ground that the statutes had been rendered void by the adoption of art. 1, §26. The California Supreme Court reversed the trial court, and the Supreme Court affirmed that decision. While superficially *Reitman* is similar to

[15] *See* J. Beale, The Law of Innkeepers and Hotels §298 (1906); Hogan, *The Innkeeper's Lien at Common Law*, 8 Hastings L.J. 32 (1956).

this case—in both instances a state enactment authorized the actions of private individuals—we consider it by no means controlling. The immediate purpose of Proposition 14 was to override recently enacted state anti-discrimination legislation, including a fair housing act. The California Supreme Court, which was familiar with the background of the enactment and the milieu in which it would operate, had made a finding that the provision would have the effect of significantly involving the state in matters of private discrimination. By constitutionalizing the right privately to discriminate, the amendment immunized such conduct "from legislative, executive, or judicial regulation at any level of the state government." 387 U.S. at 377. It effectively removed the issue of private discrimination from the political arena, or at least placed severe handicaps on those striving for its elimination. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L.Rev. 69, 81-82 (1967). Furthermore, Proposition 14 operated in direct opposition to an express constitutional goal embodied in the post-Civil War amendments: the elimination of racial discrimination. A number of courts have acknowledged that racial discrimination involved in a case may be an appropriate factor for consideration in the sifting and weighing of circumstances required in an analysis of state action questions. *E.g., Adams* v. *Southern California First National Bank, supra,* 492 F.2d at 333, and n.23; *Grafton* v. *Brooklyn Law School,* 478 F.2d 1137, 1142 (2d Cir. 1973) (Friendly, J.).

What is present in this case differs substantially from *Reitman*. The statutes involved here were not enacted in contravention of a constitutional goal. Ch. 82, §57 was passed in 1874 and ch. 71, §2 in 1909. Both provisions remain unchanged from their original form. To be sure, these provisions allowed hotel proprietors to take action that the common law did not previously permit. But we do not attach overriding significance to this limited expansion of the common law. It is but one consideration to be included in the mix. The First Circuit has recently failed to be persuaded that a statutory expansion of the common law innkeepers' lien was a basis for finding state action:

> The statute at issue is a fairly unremarkable product of the continuing legislative function to define creditors' rights. . . . If it goes beyond the common law, it does so merely by broadening the class (innkeepers) having traditional right to a possessory lien. And even this modest change occurred 115 years ago.

Davis v. *Richmond,* 512 F.2d 201, 203 (1st Cir. 1975), (citation omitted). And although the Supreme Court in *Jackson* v. *Metropolitan Edison Co., supra,* noted that there existed a comon law right to terminate service for non-payment, 419 U.S. at 354 n.11, the Court apparently did not consider this a crucial factor in finding an absence of state action. At the turn of the century, the concept of due process had not evolved to its present-day point where summary repossession of property with participation of state officers is constitutionally impermissible in all but the most limited circumstances.[16] And it cannot be persuasively argued, in light of the then existing remedy of self-help for innkeepers and others, that the Fourteenth Amendment upon its enactment was intended to do away with summary self-help procedures. *Adams* v. *Southern California First National Bank, supra,* 492 F.2d at 337.

Nor do the hotelkeepers' remedies possess an exalted constitutional status where they are insulated from the possibility of legislative reforms. They are subject to the operation of normal political forces. This is also not a case in which the state has actively involved itself in the affairs of hotel proprietors. There is no continuing interdependence such as characterized the lessor-lessee relationship between the parking authority and the coffee shop in *Burton* v. *Wilmington Parking Authority.* Nor is there even an ongoing regulatory scheme such as the liquor licensing in *Moose Lodge* or the public utility regulation in *Jackson* v. *Metropolitan Edison Co.,* both of which the Supreme Court found were in any event an insufficient basis for finding state action. All that the State of Illinois has done is to enact statutes which permit a private hotel proprietor to detain the property of guests in an establishment owned by him. The statutes do not compel such a procedure. *See Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 170-71 (1970); *Peterson* v. *City of Greenville,* 373 U.S. 244, 248 (1963); *Moose Lodge No. 107* v. *Irvis, supra,* 407 U.S. at 178-79 (Although State action was not otherwise present, it did exist where a state regulation re-

[16] See the cases cited in note 6 *supra*.

quired adherence to a racially restrictive bylaw). They merely permit it, much in the same way as Georgia law in *Evans* v. *Abney*, 396 U.S. 435 (1970), permitted interpretation of Senator Bacon's will to require the closing of a public park rather than apply the *cy pres* doctrine and make the park racially integrated. The impact on private ordering is minimal. *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. Cal. L.Rev. 1, 47 (1973). This degree of involvement falls short of the significant degree of encouragement or affirmative support necessary to the existence of state action.

B. *Public Function*

The actions of private individuals or entities on whom the state has conferred powers and functions traditionally exclusively reserved to the state may become subject to constitutional limitations. *E.g., Evans* v. *Newton*, 382 U.S. 296 (1966) (operation of a municipal park); *Terry* v. *Adams*, 345 U.S. 461 (1953) (conducting of a pre-primary election by a political organization); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (operation of a company-owned town). *See also Jackson* v. *Metropolitan Edison Co., supra*, 419 U.S. at 352-53 ("If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."). The plaintiffs argue that by allowing hotel proprietors to seize the personal property located in a resident's room without any prior adjudication to the proprietor's claim for charges, the state has delegated a state function traditionally performed by officers of the law and court. The plaintiffs rely most heavily on *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970). There a private landlord had entered the dwelling of a tenant and removed a television set pursuant to a Texas statute giving landlords a lien on the personal property of their tenants. The court found state action on the ground that the landlord was performing what was ordinarily a state function:

> In this case the alleged wrongful conduct was admittedly perpetrated by a person who was not an officer or official of any state agency. But the action taken, the entry into another's home and the seizure of another's property, was an act that possessed many, if not all, of the characteristics of an act of the State. The execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien, has in Texas traditionally been the function of the Sheriff or constable.

Id. at 439.

Perhaps distinctions can be drawn between this case and *Hall*, but we do not think that they would be very satisfactory ones. For example, the Texas statute in *Hall* expressly granted landlords the right to enter a dwelling by authorizing them "to take and retain possession" of "property found within the dwelling." *Id.* at 432 n.1. Ch. 71, §2 does not contain the same language, *cf. Calderon* v. *United Furniture Co.*, 505 F.2d 951 (5th Cir. 1974), but the right to enter a room may be implicit in the statute. Also, involved in this case is a hotel room, rather than an apartment or house. But there is no question that the plaintiffs in this case used the hotels as their principal long-term residences. Thus, the distinctions do not cut very deeply. Fundamentally, we simply disagree with the result in *Hall*.[17] The historical accuracy of that case's assertion that the execution of liens was traditionally a state function has been questioned. Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. Cal. L. Rev. 1, 50 (1973). And this assessment seems correct, except insofar as *Hall* may have relied on particular characteristics of prior Texas law. Plaintiffs freely acknowledge the hoary nature of the innkeepers' lien, and a landlord's right to seize property of a tenant whose rent is in arrears has common law roots as well.[18] Thus, while the sheriff un-

[17] Because we are choosing one of the views on which there is a conflict between circuits, this opinion was circulated, before filing, to all judges of this Court in regular active service. A majority voted against a hearing *en banc* on this issue, but Judges Swygert and Stevens voted for such a hearing.

[18] 2 F. Pollock & F. Maitland, The History of English Law 576 (2d ed. 1898). In Illinois a landlord has the right to seize and detain the property of a nonpaying tenant, Ill. Rev. Stat. ch. 80, §16, although apparently only after a distress proceeding has been commenced. *Cottrell* v. *Gerson*, 296 Ill. App. 412, 16 N.E. 2d 529 (1938), *aff'd*, 371 Ill. 174, 20 N.E. 2d 74 (1939).

Other courts have recognized the existence of some form of self-help repossession at common law. *E.g., Gibbs* v. *Titelman*, 502 F.2d 1107, 1114 (3d Cir.), *cert. denied*, 419 F.2d 1039 (1974); *Adams* v. *Southern California First National Bank, supra*, 492 F.2d at 337.

questionably is often the party who executes a lien, the function can hardly be said to be traditionally and exclusively that of the state. At most it is one that has been shared by the state with private persons. We see little similarity between this case and the public function cases decided by the Supreme Court and therefore find no basis for concluding that there is state action here.

Because we hold that there is no state action, we have no occasion to consider whether the actions of the hotel proprietors would be violative of the Fourth or Fourteenth Amendments had state action been present.[19]

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

[19] We note that the plaintiffs are not left remediless if their property was seized without good cause. They should be entitled to bring an action for replevin and collect whatever damages might have been caused by the loss of their property. Ill. Rev. Stat., ch. 119, §1, et seq. (Supp. 1975-76).

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1118

DON BENSCHOTER,
Appellant,

-vs-

THE FIRST NATIONAL BANK OF LAWRENCE and
KUHN TRUCK AND TRACTOR COMPANY, INC.
Appellees.

On Appeal From the Supreme Court of Kansas

BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLANT

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BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS OR AFFIRM

Appellant, pursuant to the authority contained in Rule 16(4) of the Rules of the Supreme Court of the United States, makes the following suggestions in opposition to the motions to dismiss this appeal or in the alternative to affirm the judgment of the Supreme Court of Kansas filed herein by the individual appellees:

1. THE INSTANT APPEAL IS WITHIN THE COURT'S JURISDICTION.

Appellee, The First National Bank of Lawrence, lists as its first ground for dismissal of the instant appeal that the appeal was not taken in strict conformity with Rule 33 in that proof of service of appellant's notice of appeal was made by a certificate of service rather than by an affidavit of service. Appellee notes an awareness of this Court's holding in *Parker v. Levy*, 417 U.S. 733 (1974), which held that such a technical noncompliance did not effect the jurisdiction of this Court. However, appellee urges that the additional fact that Appendix "D" of appellant's jurisdictional statement, which sets forth appellant's notice of appeal and indicates that both Fred W. Phelps and Robert E. Tilton signed the certificate of

service while in fact only Fred W. Phelps actually signed it, somehow calls for a different conclusion and deprives this Court of jurisdiction over this appeal.

As this Court pointed out in *Heflin v. United States*, 358 U.S. 415, 418, n. 7 (1959) and again in *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1968), both of which are cited in rejecting the claim in *Parker*, the time limitation is not jurisdictional. So long as the appellee receives actual notice of the appeal, technical noncompliance with Rule 33 does not deprive this Court of jurisdiction to hear the appeal. There being no real distinction between *Parker* and the instant appeal, since appellees herein do not deny having received actual notice of this appeal, a stenographic error in transcribing the signatures in Appendix "D" should not be held to raise this error above a mere technicality. Appellant submits that *Parker* should be found to control and that this first ground for dismissal urged by appellee should be rejected.

2. THE INSTANT APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The major ground urged by both appellees herein for dismissal of this appeal or for affirmation of the state court's decision is that no substantial federal question is involved. It is the contention of the appellant that there is such a substantial federal question. The recent decisions of this Court dealing with

debtor's rights, starting with *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), have sparked a great deal of interest, debate and controversy among the members of the legal profession as well as among the public at large. This interest, in turn, has led to considerable litigation in an attempt to define the limits of the rights recognized by this Court. One major question which has been raised has been whether the protection of the due process clause of the Fourteenth Amendment extends to the protection of debtors from the deprivation of property in which they have an unquestioned interest through the simple expedient of the remedy commonly known as "self-help repossession". The extent of this interest is shown by the numerous cases cited by the appellees in their motion. While appellant readily admits that the weight of authority in these recent decisions is against the position urged by appellant, it is certainly not unanimous, and, just as certainly, it has not definitively settled the question presented herein. Appellant submits that what is needed, both by the legal profession and by the public at large, is for this Court to make a definitive statement, whatever that decision might be, in order to further delineate the rights of this ever increasing body of debtors in our society.

Those decisions which have upheld the constitutionality of this section of the Uniform Commercial Code have normally done so based on a finding that the required state action was not present. This finding, in turn, has arisen from the fact that

self-help repossession derives from the common law, and that section 9-503 of the Uniform Commercial Code does nothing more than codify this common law remedy.

While appellant recognizes that self-help repossession was recognized and sanctioned by the case law of Kansas prior to its codification in the section in question, appellant contends that this codification as a part of the comprehensive scheme of creditors' remedies contained in Article 9 of the Uniform Commercial Code had the effect of emphasizing and encouraging its use so as to entwine the state in the repossession of goods in this manner. Appellant would urge this Court to adopt the reasoning of Chief Judge Fox in his decision in *Watson v. Branch County Bank*, 380 F.Supp. 945 (1974), and find that the legislature of the State of Kansas, in choosing to involve itself in a restructuring and codification of creditor remedies in general through the adoption of Article 9 of the Uniform Commercial Code, took upon itself the duty to provide for due process of law and that the inclusion of 9-503 in that comprehensive plan violated that duty and resulted in sufficient state action to allow this Court to review the constitutionality of K.S.A. 84-9-503 under the due process clause of the Fourteenth Amendment.

3. CONCLUSION.

In conclusion, appellant submits that the interests of the public as a whole, and those of the legal profession and the

courts, would best be served by a definitive determination of the issues presented by the instant appeal. Appellant submits that a substantial federal question is herein presented and that the requisite state action for application of the Fourteenth Amendment to this situation is to be found in the legislative adoption of a comprehensive plan of creditor remedies, such as Article 9 of the Uniform Commercial Code, authorizing and encouraging the use of self-help repossession. Appellant submits that the requisite state action is to be found despite the common law origins of the self-help remedy. For these reasons, appellant respectfully urges that the motions filed herein by the individual appellees to dismiss this appeal or alternatively to affirm the judgment of the Supreme Court of Kansas should be denied and that this appeal should proceed.

Respectfully submitted,

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